No. 91-372

In The

Supreme Court of the United States

October Term, 1991

STATE OF GEORGIA,

Petitioner,

v.

THOMAS McCOLLUM, WILLIAM JOSEPH McCOLLUM, and ELLA HAMPTON McCOLLUM,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Georgia

JOINT APPENDIX

HARRISON W. KOHLER*
Senior Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334
Telephone: (404) 651-6194

Counsel for Petitioner

ROBERT H. REVELL, JR.*
2402 Dawson Road
Suite 3
P.O. Box 70455
Albany, Georgia 31707-0003
Telephone: (912) 434-0300

Counsel for Respondents

*Counsel of Record

Petition for Certiorari Filed September 3, 1991
Certiorari Granted November 4, 1991

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

RELEVANT DOCKET ENTRIES

Superior Court of Dougherty County
State of Georgia

8/10/90	INDICTMENT charging McCollums with four counts of aggravated assault and two counts of simple battery.
10/2/90	MOTION By State of Georgia with attachment and brief.
10/22/90	ORDER of Superior Court denying State's motion.
1/22/91	STIPULATION with attachment

No. 90R816

SUPERIOR COURT, DOUGHERTY COUNTY

May Term, 1990

THE STATE

vs.

Thomas Scott McCollum
William Joseph McCollum
Ella Hampton McCollum

Ct. 1-2 Aggravated Assault (2 cts.) – (T. S. McCollum)

Ct. 3- Simple Battery (W. J. McCollum)

Ct. 4- Simple Battery (Ella Hampton McCollum)

Ct. 5 & 6Aggravated Assault – 2 cts. (W. J. McCollum)

True BILL
/s/ Milton O. Tate
Foreman

BRITT R. PRIDDY, District Attorney

Jerry Collins/Myra Collins
Prosecutor

x INDICTMENT
___ SPECIAL PRESENTMENT
___ ACCUSATION

Received in Open Court from the sworn Grand Jury Bailiff and filed in office this 10 day of Aug. 1990.

/s/ Imanell Gable
Clerk

WITNESSES FOR THE STATE
/s/ Jerry Collins
/s/ Myra Collins

GEORGIA, DOUGHERTY COUNTY:

THE GRAND JURORS, selected, chosen and sworn for the County of Dougherty, to-wit:

	1 Milton O. Tate Foreman		
2	Stephen G. Bailey	13	Joanne Wilson
3	Shirley Cates	14	James Edward Lamb
4	Marnie Parrish	15	Alonzer Gilbert, Jr.
5	Jeanette Marsh Geeslin	16	Flora Caruthers Lewis
6	Anissa Lane Fowler	17	Nadara M. Lentz
7	Karen O'Connor Floyd	18	Barbara Odom Mixon
8	Larry F. Braun	19	Charles Q. Wright, III
9	Nathaniel Harris	20	Bill Hughey
10	Walter M. Blankenship, Jr.	21	Hoyt Palmer
11	Frances Black	22	John H. Scott, Jr.
12	Robert Lee James	23	Barbara W. Reese

COUNT I

In the name and behalf of the citizens of Georgia, charge and accuse Thomas Scott McCollum with the offense of Aggravated Assault for that the said accused, in the County aforesaid, on the 5th day of January, Nineteen Hundred and Ninety, did then and there unlawfully make an assault upon the person of Myra Collins by striking her on the forehead with a certain baseball bat and a certain wall plaque, instruments which when used offensively against a person are likely to result in serious bodily injury, contrary to the laws of said State, the good order, peace and dignity thereof;

COUNT II

And the aforesaid charging authority, in the name and behalf of the citizens of Georgia, charge and accuse Thomas Scott McCollum with the offense of Aggravated Assault for that the said accused, in the County aforesaid, on the 5th day of January, 1990, did then and there unlawfully make an assault upon the person of Jerry Collins by attempting to strike him with a certain baseball bat, an instrument which when used offensively against a person is likely to result in serious bodily injury, contrary to the laws of said State, the good order, peace and dignity thereof;

COUNT III

And the aforesaid charging authority, in the name and behalf of the citizens of Georgia, charge and accuse William Joseph McCollum with the offense of Simple Battery for that the said accused, in the County aforesaid, on the 5th day of January, 1990, did intentionally cause physical harm to Myra Collins by beating her with his hands knocking her to the floor,

contrary to the laws of said State, the good order, peace and dignity thereof.

COUNT IV

And the aforesaid charging authority, in the name and behalf of the citizens of Georgia, charge and accuse Ella Hampton McCollum with the offense of Simple Battery for that the said accused, in the County aforesaid, on the 5th day of January, 1990, did intentionally cause physical harm to Myra Collins by repeatedly kicking her, contrary to the laws of said State, the good order, peace and dignity thereof;

COUNT V

And the aforesaid charging authority, in the name and behalf of the citizens of Georgia, charge and accuse William Joseph McCollum with the offense of Aggravated Assault for that the said accused, in the County aforesaid, on the 5th day of January, 1990, did then and there unlawfully make an assault upon the person of Myra Collins by assaulting her with a certain gun, an instrument which when used offensively against a person is likely to result in serious bodily injury, contrary to the laws of said State, the good order, peace and dignity thereof;

COUNT VI

And the aforesaid charging authority, in the name and behalf of the citizens of Georgia, charge and accuse William Joseph McCollum with the offense of Aggravated Assault for that the said accused, in the County aforesaid, on the 5th day of January, 1990, did then and there unlawfully make an assault upon the person of Myra Collins by beating her head on a counter top, an instrument which when used offensively against a person is likely to result in serious bodily injury, contrary to the laws of said State, the good order, peace and dignity thereof.

/s/ Milton O. Tate

FOREMAN, GRAND JURY

BRITT R. PRIDDY,
DISTRICT ATTORNEY

IN THE SUPERIOR COURT OF DOUGHERTY COUNTY

STATE OF GEORGIA

STATE OF GEORGIA	*	
	*	
v.	*	INDICTMENT
THOMAS SCOTT McCOLLUM,	*	NO. 90 R 816
WILLIAM JOSEPH McCOLLUM,	*	
and ELLA HAMPTON	*	
McCOLLUM,	*	
	*	
Defendants.		

STATE'S MOTION TO PROHIBIT DEFENDANTS' EXERCISE OF PEREMPTORY STRIKES IN A RACIALLY DISCRIMINATORY MANNER

Now comes the State of Georgia, by the Attorney General, and prays that this Court enter an order requiring that if during the jury selection in this case the State makes out a prima facie case that the Defendants are exercising their peremptory strikes in a racially discriminatory manner, the Defendants must give a neutral reason for the exercise of each peremptory strike or the black juror will be placed on the petit jury.

1.

The Defendants have been indicted for several assaultive crimes against the victims. The Defendants are white, and the victims are black.

2.

Two of the key eyewitnesses in this case, whom the State expects to call to testify at trial, are black.

3.

The State expects that its evidence will show that the race of the victims was a factor in the Defendants' assaults upon the victims.

4.

In Dougherty County approximately 43% of the population is black. Attached to this pleading is a copy of 1980 Census figures for Dougherty County. If the venire mirrors the racial makeup of Dougherty County, 18 of the 42 jurors on the panel will be black. The Defendants potentially can strike all black jurors with their 20 peremptory strikes.

Therefore, the State respectfully requests that if during jury selection the State makes out a prima facie case that Defendants are exercising their peremptory strikes in a racially discriminatory manner, this Court require that Defendants give a neutral explanation for the peremptory

strikes of each black juror or those jurors will be placed on the petit jury.

Respectfully submitted,

MICHAEL J. BOWERS 071650
Attorney General

/s/ Harrison Kohler
HARRISON KOHLER 427725
Deputy Attorney General

PLEASE SERVE:

HARRISON KOHLER
Deputy Attorney General
132 State Judicial Building
Atlanta, Georgia 30334
(404) 651-9452

Table 45. **Age by Race, Spanish Origin, and Sex for Counties: 1980** – Con.

[For meaning of symbols, see introduction. For definitions of terms, see appendixes A and B]

Counties	Race							
	Total		White		Black		Spanish origin[3]	
	Male	Female	Male	Female	Male	Female	Male	Female
				DOUGHERTY				
Total persons	48 031	52 687	27 886	28 885	19 749	23 331	553	603
Under 5 years	4 621	4 473	2 206	2 065	2 368	2 360	60	81
Under 1 year	1 005	920	477	413	518	496	13	17
1 year	940	887	462	417	467	463	13	13
2 years	903	906	433	415	461	482	13	15
3 years	855	862	388	414	459	437	13	22
4 years	918	898	446	406	463	482	8	14
5 to 9 years	4 855	4 738	2 307	2 279	2 497	2 405	67	54
5 years	925	940	424	446	491	482	13	15
6 years	926	925	426	419	491	494	12	9
7 years	972	970	451	490	511	470	20	9
8 years	1 020	892	486	441	522	445	9	12
9 years	1 012	1 011	520	483	482	514	13	9
10 to 14 years	4 693	4 424	2 438	2 169	2 225	2 220	52	62
10 years	1 011	928	515	492	488	434	14	12
11 years	933	857	496	412	429	439	7	9
12 years	863	836	450	379	410	448	9	11
13 years	936	889	479	441	452	436	10	16
14 years	950	914	498	445	446	463	12	14
15 to 19 years	5 367	5 357	2 646	2 506	2 679	2 813	82	59
15 years	993	1 024	521	495	468	523	14	14
16 years	1 080	1 061	545	494	527	559	11	5

Counties	Total		Race					
			White		Black		Spanish origin[3]	
	Male	Female	Male	Female	Male	Female	Male	Female
17 years	1 189	995	560	478	620	508	23	14
18 years	1 081	1 090	537	524	533	557	18	13
19 years	1 024	1 187	483	515	531	666	16	13
20 to 24 years	4 675	5 392	2 575	2 723	2 043	2 611	70	66
20 years	889	1 147	459	518	420	618	13	10
21 years	921	1 068	471	505	436	547	17	18
25 to 29 years	4 454	4 827	2 608	2 525	1 810	2 240	57	52
30 to 34 years	3 840	4 076	2 429	2 402	1 370	1 626	37	48
35 to 39 years	2 777	3 088	1 909	1 934	843	1 108	22	39
40 to 44 years	2 302	2 640	1 607	1 662	678	948	13	26
45 to 49 years	2 200	2 453	1 550	1 605	636	833	16	18
50 to 54 years	2 112	2 490	1 533	1 629	561	847	24	29
55 to 59 years	1 886	2 260	1 339	1 531	538	719	13	14
60 to 64 years	1 565	1 853	1 131	1 198	431	651	13	15
65 to 69 years	1 170	1 612	757	938	410	671	9	14
70 to 74 years	762	1 172	438	654	322	515	8	11
75 to 79 years	417	861	229	473	188	386	6	6
80 to 84 years	201	541	123	348	77	192	2	6
85 years and over	134	430	61	244	73	186	2	3
18 years and over	30 600	35 972	19 309	20 905	11 044	14 756	326	373
62 years and over	3 565	5 638	2 230	3 311	1 329	2 314	36	47
65 years and over	2 684	4 616	1 608	2 657	1 070	1 950	27	40
Median	24.8	26.9	28.4	30.4	20.3	23.4	21.1	23.3

[3] Persons of Spanish origin may be of any race.

IN THE SUPERIOR COURT OF DOUGHERTY COUNTY
STATE OF GEORGIA

STATE OF GEORGIA	*	
	*	
v.	*	
	*	
THOMAS SCOTT McCOLLUM,	*	INDICTMENT
WILLIAM JOSEPH McCOLLUM,	*	NO. 90 R 816
and ELLA HAMPTON	*	
McCOLLUM,	*	
	*	
Defendants.		

BRIEF IN SUPPORT OF STATE'S MOTION TO PROHIBIT DEFENDANTS' EXERCISE OF PEREMPTORY STRIKES IN A RACIALLY DISCRIMINATORY MANNER

In *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the Supreme Court held that purposeful racial discrimination by the prosecutor in the selection of the venire violates a defendant's right to equal protection. The Court stated that racial discrimination in the selection of jurors harms not only the Defendant but also undermines public confidence in the fairness of our system of justice. *Id.* 90 L.Ed.2d at 81.

In *Batson* the Supreme Court did not reach the issue as to whether or not the principles of *Batson* are applicable to defense counsel. The Court explicitly stated, "We express no views as to whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel." *Batson v. Kentucky*, 90 L.Ed.2d at 82, n.12. However, the concurring opinion of Justice Marshall is significant as to this issue:

> Our criminal justice system "requires not only freedom from any bias against the accused, but

> also from any prejudice against his prosecution. Between him and the State the scales are to be evenly held."

Batson v. Kentucky, 90 L.Ed.2d at 95.

The Sixth Amendment mandates a "trial by an impartial jury." The Eleventh Circuit has held that the principles of *Batson* apply to both civil and criminal cases and are, therefore, applicable to private parties. *Fludd v. Dykes*, 863 F.2d 822 (11th Cir. 1989), *cert. denied*, 110 S.Ct. 201. Under the Sixth Amendment, "neither prosecutor nor defense counsel may systematically exercise peremptory challenges to excuse members of a cognizable group from service on a criminal petit jury." *Booker v. Jabe*, 775 F.2d 762, 772 (6th Cir. 1985), *vacated* 478 U.S. 1001 (1986), *op. reinstated* 801 F.2d 871 (6th Cir. 1986), *cert. denied*, 479 U.S. 1046 (1987).

Moreover, Georgia's Constitution mandates a "trial by an impartial jury." Art. I, Sec. I, Para. XI. Georgia law also requires a jury selected from a "fairly representative cross-section of the intelligent and upright citizens of the county." O.C.G.A. § 15-12-40(a)(1). Although the Georgia appellate courts have not reached this issue, the State respectfully asserts that the principles of *Batson* are applicable to a criminal defendant not only by the United States Constitution but are also made applicable under both the Georgia Constitution and statutes.

Therefore, the State respectfully prays that its motion be granted.

Respectfully submitted,

MICHAEL J. BOWERS 071650
Attorney General

/s/ Harrison Kohler
HARRISON KOHLER
427725
Deputy Attorney General

PLEASE SERVE:

HARRISON KOHLER
Deputy Attorney General
132 State Judicial Building
Atlanta, Georgia 30334
(404) 651-9452

(Certificate Of Service Omitted In Printing)

IN THE SUPERIOR COURT OF DOUGHERTY COUNTY

STATE OF GEORGIA

STATE OF GEORGIA	*	
	*	
V.	*	
	*	
THOMAS McCOLLUM, WILLIAM	*	INDICTMENT
JOSEPH McCOLLUM, and ELLA	*	NO. 90 R 816
HAMPTON McCOLLUM,	*	
	*	
Defendants.	*	
	*	

ORDER

(Filed Oct. 22, 90)

The Defendants, who are white, are charged with several assaultive crimes against the victims, who are black. The State has moved that if, during jury selection, the State makes out a prima facie case that Defendants are exercising their peremptory strikes in a racially discriminatory manner, the Defendants must give a neutral reason for the exercise of each peremptory strike. The State has argued that the principles of *Batson v. Kentucky*, 476 U.S. 79 (1986), are applicable to a criminal defendant under both federal and state law.

This Court is aware of no Georgia appellate law on this issue and denies the State's Motion. Neither Georgia nor federal law prohibits criminal defendants from exercising peremptory strikes in a racially discriminatory manner.

THE STATE'S MOTION IS DENIED

However, because this issue is one of first impression for the Georgia courts, this order is of such importance to the case that an immediate review should be had.

This 22 day of Oct., 1990.

/s/ Asa D Kelley Jr
ASA D. KELLEY, JR.
Chief Judge
Dougherty Judicial Circuit

(SEAL)

SUPREME COURT
STATE OF GEORGIA
STATE JUDICIAL BUILDING
Atlanta 30334

HAROLD G. CLARKE, CHIEF JUSTICE
GEORGE T. SMITH, PRESIDING JUSTICE
CHARLES L. WELTNER
RICHARD BELL
WILLIS B. HUNT, JR.
ROBERT BENHAM
NORMAN S. FLETCHER
JUSTICES

JOLINE B. WILLIAMS,
CLERK
WM. SCOTT HENWOOD,
REPORTER

NOV 15, 1990

TO ALL COUNSEL:

RE: Application No. S91I0118, State of Georgia v. Thomas McCollum, et al.

The Court today granted this application for *interlocutory* appeal. All the Justices concur.

Your notice of appeal must be filed in the trial court within 10 days from this date. When the record is received from the trial court and docketed in this court you will be sent a docketing notice showing the date of docketing and the Case Number assigned. The appellant's enumeration of errors and briefs will be due in this Court within 20 days from the date of docketing; the appellee's briefs will be due within 40 days from the date of docketing or within 20 days after the appellant's briefs are filed, whichever is later.

The Court is particularly concerned with, and requests that you address in your briefs, the following:

Whether the Georgia Constitution's guarantee of the right to impartial trial precludes a criminal defendant from using his peremptory strikes in a racially discriminatory manner.

Joline B. Williams, Clerk
BY Lynn M. Hogg

IN THE SUPREME COURT OF GEORGIA

STATE OF GEORGIA

STATE OF GEORGIA Appellant, v. THOMAS McCOLLUM, WILLIAM JOSEPH McCOLLUM, and ELLA HAMPTON McCOLLUM, Appellees.	*	CASE NO. S91A0310

BRIEF ON BEHALF OF APPELLANT
STATE OF GEORGIA

BY THE ATTORNEY GENERAL

ENUMERATION OF ERROR

The trial court erred by ruling that a criminal defendant may use his peremptory strikes in a racially discriminatory manner.

JURISDICTION

The trial court denied the State's pretrial motion to prohibit Appellees, the criminal defendants, from exercising their peremptory strikes in a racially discriminatory manner. The trial court certified the issue for appeal (R. 48-49), and this Court granted the State's application for interlocutory review (R. 3). Jurisdiction lies in this Court because the issue presented involves the construction of the Georgia Constitution. *See* Ga. Constitution, Art. VI, Sec. VI, Para. II.

STATEMENT OF THE FACTS

Defendants, who are white, were indicted by a Dougherty County grand jury for several assaultive crimes against Myra and Jerry Collins, who are black (R. 12-14, 39, 48). The State filed a pretrial motion to prohibit Defendants from using their peremptory strikes in a racially discriminatory manner. (R 39-45). A hearing was held and the State's motion was denied. (R. 48-49).

ARGUMENT & CITATION OF AUTHORITY

Georgia's Constitutional Mandate That a Criminal Defendant Shall Have a Trial by an Impartial Jury Precludes a Criminal Defendant from Using His Peremptory Strikes in a Racially Discriminatory Manner.

The Georgia Constitution mandates, "In criminal cases, the defendant *shall have* a public and speedy *trial by an impartial jury*. Art. I, Sec. 1, Para. XI (Emphasis added). The Sixth Amendment to the United States Constitution gives "the accused . . . *the right to* a speedy and public trial, by an impartial jury [emphasis added]. . . . " "[U]nder the Sixth Amendment, neither prosecutor nor defense counsel may systematically exercise peremptory challenges to excuse members of a cognizable group from service on a petit jury." *Booker v. Jabe*, 775 F.2d 762, 772 (6th Cir. 1985), *vacated* 478 U.S. 1001 (1986), *opin. reinstated* 801 F.2d 871 (6th Cir. 1986), *cert. denied*, 479 U.S. 1046 (1987).

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), was decided on equal protection

grounds, and the Supreme Court explicitly stated, "We express no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel" *Id.*, 476 U.S. at 89 n. 12; 106 S.Ct. at 1719 n. 12; 90 L.Ed.2d at 82 n. 12.

Although the United States Supreme Court has not decided this issue, numerous state courts have. The Florida Supreme Court has held that under the Florida constitutional guarantee of the right to an impartial jury, both the state and the defense may challenge the improper use of peremptory strikes. *State v. Neil*, 457 So.2d 481, 486-87 (Fla.S.Ct. 1984). "The state, no less than a defendant, is entitled to an impartial jury." *Id.* at 487.

The Massachusetts Supreme Court also decided that its state constitutional guarantee of an impartial jury entitles the commonwealth "to a representative jury, unimpaired by improper exercise of peremptory strikes by the defense." *Commonwealth v. Soares*, 387 N.E.2d 499, 508, 517 n. 35 (Mass.S.Ct. 1979), *cert. denied*, 444 U.S. 881 (1979); *Commonwealth v. Reid*, 424 N.E.2d 495, 500 (Mass.S.Ct. 1981).

California appellate courts have reached the same result but have based their decisions on their state constitutional requirement to have a jury drawn from a representative cross section of the community. *See, e.g., People v. Pagel*, 232 Cal.Rptr. 104, 106 (1986), *cert. denied*, 481 U.S. 1028 (1987); *People v. Wheeler*, 583 P.2d 748 (Cal.S.Ct. 1978). "[T]he People no less than an individual defendants are entitled to a trial by *an impartial jury* drawn from a representative cross section of the community." *People v.*

Pagel, 232 Cal.Rptr. at 107; *People v. Wheeler*, 583 P.2d at 765 n. 29 (Emphasis added).

Reported trial court decisions from New York and New Jersey have held that a criminal defendant may not exercise his peremptory strikes in a racially discriminatory manner. *See, e.g., People v. Gary M.*, 526 N.Y.Supp.2d 986 (Kings City.,N.Y.,S.Ct. 1988); *State v. Alvarado*, 534 A.2d 440 (Union City.,N.J.,Sup.Ct. 1987).

In the jury selection of a criminal case, three entities, in addition to the defendant, have a right to a fair and impartial jury. Although the victim is not a party in a criminal case, his or her interest, both emotional and sometimes financial, can be vitally affected. "It is declared to be the policy of this state that restitution to their victims by those found guilty of crimes is a primary concern of the criminal justice system." O.C.G.A. § 17-14-1. Georgia's constitutional requirement that the criminal defendant have an impartial jury, not one biased in his favor, means the victim is also entitled to an impartial jury.

Second, society is entitled to an impartial jury in the trial of a criminal defendant. The racially discriminatory exercise of peremptory strikes by either the state or the defendant undermines confidence in the fairness of our system of justice. *See generally, Batson v. Kentucky*, 479 U.S. at 87, 106 S.Ct. at 1718, 90 L.Ed.2d at 81. Moreover, if a society believes that a criminal defendant is able to obtain an acquittal by the racially discriminatory use of peremptory strikes, there can be the motivation for self-help and vigilante justice. *See generally, Conner v. State*, 251 Ga. 113, 120, 303 S.E.2d 266 (1983), *cert. denied*, 464 U.S. 865 (1983).

Where the state proves the defendant guilty beyond a reasonable doubt, the purposes of criminal punishment – deterrence, protection of society, and retribution – should be carried out. *See generally, Conner v. State*, 251 Ga. at 120.

Third, the racially motivated exercise of peremptory strikes discriminates against the jurors. A person's race is unrelated to his fitness as a juror, and no person should be peremptorily struck simply because of the color of his or her skin. *Batson v. Kentucky*, 476 U.S. at 87, 106 S.Ct. at 1718, 90 L.Ed.2d at 81.

Peremptory challenges are not of constitutional dimension, O.C.G.A. § 15-12-165, and racially discriminatory challenges must give way to Georgia's constitutional requirement that the criminal defendant shall have an impartial jury. As Justice Marshall stated

> Our criminal justice system "requires not only freedom from bias against the accused but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held."

Batson v. Kentucky, 476 U.S. at 107, 106 S.Ct. at 1729, 90 L.Ed.2d at 95 (J. Marshall concurring).

Georgia's mandate that the defendant shall have an impartial jury means that under our constitution, neither the State nor the criminal defendant can discriminate in jury selection. Therefore, the State respectfully prays this Court reverse the trial court and direct that the criminal

defendants in this case may not use their peremptory strikes in a racially discriminatory manner.

Respectfully submitted,

/s/ Michael J. Bowers
MICHAEL J. BOWERS 071650
Attorney General

/s/ Harrison Kohler
HARRISON KOHLER 427725
Deputy Attorney General

PLEASE ADDRESS ALL
COMMUNITCATIONS TO:

HARRISON KOHLER
Deputy Attorney General
132 State Judicial Building
Atlanta, Georgia 30334
Telephone: (404) 651-9452

(Certificate Of Service Omitted In Printing)

IN THE SUPREME COURT OF GEORGIA

STATE OF GEORGIA

STATE OF GEORGIA,	:	
Appellant	:	
v.	:	
THOMAS MCCOLLUM, WILLIAM JOSEPH MCCOLLUM, and ELLA HAMPTON MCCOLLUM,	:	CASE NO. S91A0310
Appellees	:	

BRIEF ON BEHALF OF APPELLEES

I. NATURE AND HISTORY OF THE CASE.

This case comes to the Supreme Court of Georgia from the Superior Court of Dougherty County, Georgia, and it arises out of warrants taken and indictments issued against the Appellees as a result of an alleged altercation between the Appellees and parties by the name of Myra Collins and Jerry Collins. The altercation allegedly took place at the place of business of the Appellees (McCollum's Cleaners, 615 E. Broad Avenue, Albany, Georgia). (R.28)[1] A dispute apparently arose concerning services rendered for Myra Collins and Jerry Collins and the dispute generated into a fight between the Appellees and Myra Collins and Jerry Collins. (R.29). The Appellees are white and the Collins are black.

[1] Numbers in parenthesis refer to pages of record.

THE STATE FILED A PRETRIAL MOTION ENTITLED "STATE'S MOTION TO PROHIBIT DEFENDANTS' EXERCISE OF PEREMPTORY STRIKES IN A RACIALLY DISCRIMINATORY MANNER." On October 22, 1990 hearing of the aforementioned motion was had before the Honorable Asa D. Kelley, Jr., Chief Judge of the Dougherty Judicial Circuit, at which hearing it was stipulated that a communique or notice in the form of Exhibit "A", attached hereto, was circulated throughout the black community of Albany, Dougherty County, Georgia.

After such hearing, Judge Kelley denied the State's motion and in his order certified that the issue was of such importance that an immediate review should be had. (R.48 & 49).

This Court on November 15, 1990 granted the State's Application for Interlocutory Appeal and the case is now before this Court for determination.

This Court in its Order granting the Application for Interlocutory Appeal, provided that the Court was particularly concerned with whether the Georgia Constitution's guarantee of the right to impartial trial precludes a criminal defendant from using his peremptory strikes in a racially discriminatory manner.

ARGUMENT AND CITATIONS OF AUTHORITY

ARTICLE I, SECTION I, PARAGRAPH 11 OF THE CONSTITUTION OF GEORGIA PLACES NO RESTRICTIONS ON A CRIMINAL DEFENDANT'S USE OF PEREMPTORY STRIKES IN THE SELECTION OF A JURY AND THEREFORE DOES NOT PRECLUDE A CRIMINAL DEFENDANT FROM UTILIZING HIS PEREMPTORY STRIKES IN ANY MANNER DESIRED.

Article I, Section 1, Paragraph 11 of the Constitution of Georgia provides, in part, as follows:

> " . . . In criminal cases, the defendant shall have a public and speedy trial by an impartial jury . . . "

and further in part,

"The General Assembly shall provide by law for the selection and compensation of persons to serve as grand jurors and trial jurors . . . "

O.C.G.A Section 15-12-165 provides:

"Every person indicted for a crime or offense which may subject him to death or to imprisonment for not less than four years may peremptorily challenge 20 of the jurors empaneled to try him. Every person indicted for an offense which may subject him to imprisonment in a penal institution for any time less than four years may peremptorily challenge 12 of the jurors empaneled to try him. The State shall be allowed one-half the number of peremptory challenges allowed to the accused. (Laws 1833, Cobb's 1851 Digest. p. 835; Code 1863, § 4530; Code 1868, § 4549; Code 1873, § 4643; Code

1882, § 4643; Penal Code 1895, § 974; Penal Code 1910, § 1000; Code 1933, § 59-805.)".

It is thus seen that the State of Georgia has at least since the year 1833 had statutes pertaining to peremptory challenges. We find no case in Georgia placing any limitation on the use of peremptory challenges by a defendant.

There have been contentions made in the State of Georgia that the State, in exercising its peremptory challenge of jurors, systematically struck from the panel of jurors black men and that such constituted a violation of a defendant's constitutional rights. This Court has constantly held where such challenges were made, that a peremptory challenge is an arbitrary or capricious species of challenge to a certain number of jurors allowed to the parties without the necessity of their showing any consideration therefor. In the very nature of such a challenge, no reason need be shown or assigned for the exercise of the right.

See: ***Watkins v. State,*** 199 Ga. 81, 94 (35 SE2d 325); ***Hatton v. Smith,*** 228 Ga. 378 (2) (185 SE2d 388); ***Hoggs. v. State,*** 229 Ga. 556 (6) (192 SE2d 903; ***Willis v. State,*** 243 Ga. 185 (2), (253 SE2d 70); ***Blackwell v. State,*** 248 Ga. 138, (281 SE 2d 599); ***Pope v. State,*** 256 Ga. 195 (345 SE2d 831).

However, the case of ***Batson v. Ky.,*** 476 US 79, 90 L Ed 2d 69, 106 S Ct 1713, holds in a split decision that a prosecutor's use of peremptory challenges to exclude blacks from a jury trying black defendants is a basis for an equal protection claim of purposeful discrimination. The Supreme Court of Georgia has given credence to ***Batson*** and the law of Georgia now is that a prosecutor's use of peremptory challenges to excuse blacks is a basis

for a defendant contending that the prosecutor, or State, used its peremptory strikes to excuse blacks, simply because of their color. However, ***Batson*** did not reach the issue as to whether its principles were applicable to a defendant's use of peremptory challenges and, as stated above, we find no case in Georgia placing any limitations on the use of peremptory challenges by a defendant. The equal protection clause of the United States Constitution is designed to insure that a defendant is not discriminated against by the United States or by any of its states.

This Court's directions seem to indicate that the Court is particularly concerned with the Georgia Constitution's guarantee of the right to impartial trial and whether or not such right precludes a criminal defendant from using his peremptory strikes in any manner he chooses. Georgia's Constitution, as set forth above, provides:

> "In criminal cases the defendant shall have a public and speedy trial by an impartial jury . . . ".

Clearly this provision guarantees that a defendant will have a venire placed upon him that represents a cross-section of the community and from which he may have the right to select jurors that are not partial or may not be more partial to the other side of the case. A defendant's reason for excusing a venireman should not be subject to judicial scrutiny.

Both Article I, Section 1, Paragraph 11, of the Constitution of Georgia and the Sixth Amendment to the United States Constitution were designed to protect individual persons against the arbitrary use of power by the State.

The Supreme Court of the United States held in the case of ***Holland v. Illinois,*** 493 US ___, 107 L Ed 2d 905, 110 S Ct ___, that a prosecutor's exercise of peremptory challenges to exclude all black potential jurors from white defendants' petit juries did not violate defendant's Sixth Amendment right to trial by impartial jury. In ***Holland, supra,*** beginning on Page 916, the Supreme Court had the following to say:

> "The Sixth Amendment requirement of a fair cross section on the venire is a means of assuring not a representative jury (which the Constitution does not demand), but an impartial one (which it does). Without that requirement, the State could draw up jury lists in such manner as to produce a pool of prospective jurors disproportionately ill disposed towards one or all classes of defendants, and thus more likely to yield petit juries with similar disposition. The State would have, in effect, unlimited peremptory challenges to compose the pool in its favor. The fair-cross-section venire requirement assures, in other words, that in the process of selecting the petit jury the prosecution and defense will compete on an equal basis.
>
> But to say that the Sixth Amendment deprives the State of the ability to 'stack the deck' in its favor is not to say that each side may not, once a fair hand is dealt, use peremptory challenges to eliminate prospective jurors belonging to groups it believes would unduly favor the other side. Any theory of the Sixth Amendment leading to that result is implausible. The tradition of peremptory challenges for both the prosecution and the accused was already venerable at the time of ***Blackstone,*** see

4 *W. Blackstone Commentaries* 346-348 (1769), was reflected in a federal statute enacted by the same Congress that proposed the Bill of Rights, see Act of Apr. 30, 1790, ch. 9, § 30, 1 Stat 119, was recognized in an opinion by Justice Story to be part of the common law of the United states, see *United States v. Marchant,* 12 Wheat 480, 483-484, 6 L Ed 2d 700 (1827), and has endured through two centuries in all the States, see *Swain, supra,* at 215-217, 13 L Ed 2d 759, 86 S Ct 824. The constitutional phrase 'impartial jury' must surely take its content from this unbroken tradition. One could plausibly argue (though we have said the contrary, see *Stilson v. United States,* 250 US 583, 586, 63 L Ed 1154, 40 S Ct 28 (1919)) that the requirement of an 'impartial jury' impliedly compels peremptory challenges, but in no way could it be interpreted directly or indirectly to prohibit them. We have gone out of our way to make this clear in our opinions. In *Lockhart,* we said: 'We have never invoked the fair-cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large.' 476 US, at 173, 90 L Ed 2d 137, 106 S Ct 1758. In *Taylor,* we 'emphasized that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition.' 419 US, at 538, 42 L Ed 2d 690, 95 S Ct 692. Accord, *Duren v. Missouri,* 439 US, at 363-364, and n 20, 58 L Ed 2d 579, 99 S Ct 664.

The fundamental principle underlying today's decision is the same principle that underlay *Lockhart,* which rejected the claim that allowing challenge for cause, in the guilt phase of a capital trial, to jurors unalterably opposed to the death penalty (so-called 'Witherspoon-excludables') violates the fair-cross-section requirement. It does not violate that requirement, we said, to disqualify a group for a reason that is related 'to the ability of members of the group to serve as jurors in a particular case.' 476 US, at 175, 90 L Ed 2d 137, 106 S Ct 1758 (emphasis added). The 'representativeness' constitutionally required at the venire stage can be disrupted at the jury-panel state to serve a State's 'legitimate interest.' Ibid. In *Lockhart* the legitimate interest was 'obtaining a single jury that can properly and impartially apply the law to the facts of the case at both the guilt and sentencing phases of a capital trial.' Id., at 175-176, 90 L Ed 2d 137, 106 S Ct 1758. Here the legitimate interest is the assurance of impartiality that the system of peremptory challenges has traditionally provided.

The rule we announce today is not only the only plausible reading of the text of the Sixth Amendment, but we think it best furthers the Amendment's central purpose as well. Although the constitutional guarantee runs only to the individual and not to the State, the goal it expresses is jury impartiality with respect to both contestants; neither the defendant nor the State should be favored. This goal, it seems to us, would positively be obstructed by a petit jury cross-section requirement which, as we have described, would cripple the device of peremptory challenge. We have acknowledged

that that device occupies 'an important position in our trial procedures,' ***Batson,*** 476 US, at 98, 90 L Ed 2d 69, 106 S Ct 1712, and has indeed been considered 'a necessary part of trial by jury,' ***Swain v. Alabama,*** 380 US, at 219, 13 L Ed 2d 759, 85 S Ct 824. Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of 'eliminat[ing] extremes of partiality on both sides,' ibid., thereby 'assuring the selection of a qualified and unbiased jury,' *Batson, supra,* at 91, 90 L Ed 2d 69, 106 S Ct 1712 (emphasis added)."

No claim is made relative to the venire in Dougherty County, Georgia not representing a fair-cross-section of the community of Dougherty County, Georgia. This is what is required by the Sixth Amendment to the Constitution of the United States and by Article I, Section 1, Paragraph 11 of the Constitution of Georgia.

Peremptory challenges have been described as a necessary part of trial by jury. See ***Swain v. Alabama,*** 380 US 202, at 219, 13 L Ed 2d 759, 85 S Ct 824. As Justice Rehnquist (now Chief Justice Rehnquist), stated in his dissent in ***Batson v. Ky.,*** 90 L Ed 2d at pages 114 and 115:

"In my view, there is simply nothing 'unequal' about the State's using its peremptory challenges to strike blacks from the jury in cases involving black defendants, so long as such challenges are also used to exclude whites in cases involving white defendants, Hispanics in cases involving Hispanic defendants, Asians in cases involving Asian defendants, and so on. [470 US 138]. This case-specific use of peremptory challenges by the State does not single out

blacks, or members of any other race for that matter, for discriminatory treatment. Such use of peremptories is at best based upon seat-of-the-pants instincts, which are undoubtedly crudely stereotypical and may in many cases be hopelessly mistaken. But as long as they are applied across-the-board to jurors of all races and nationalities, I do not see – and the Court most certainly has not explained – how their use violates the Equal Protection Clause.

Nor does such use of peremptory challenges by the State infringe upon any other constitutional interests. The Court does not suggest that exclusion of blacks from the jury through the State's use of peremptory challenges results in a violation of either the fair-cross-section or impartiality component of the Sixth Amendment. See ante, at 84-85, n.4, 90 L Ed 2d at 79-80. And because the case-specific use of peremptory challenges by the State does not deny blacks the right to serve as jurors in cases involving non-black defendants, it harms neither the excluded jurors nor the remainder of the community. See ante, at 87-88, 90 L Ed 2d, at 81-82.

The use of group affiliations, such as age, race, or occupation, as a 'proxy' for potential juror partiality, based on the assumption or belief that members of one group are more likely to favor defendants who belong to the same group, has long been accepted as a legitimate basis for the State's exercise of peremptory challenges . . . ".

Georgia has had a system of peremptory challenges for well over 150 years without any Court in the State of Georgia determining that a defendant's use thereof could

be set aside on the claim that such peremptory challenges were subject to judicial scrutiny. This system should not be changed by judicial fiat. Peremptory is defined in Black's Law Dictionary as: "Imperative; absolute; conclusive; positive; not admitting a question, delay or reconsideration. Positive; final; decisive; not admitting of any alternative. Self-determined; arbitrary; not requiring any consideration to be shown." This Court should not disturb the long standing rule that a criminal defendant has the right to exercise peremptory challenges in any manner chosen.

Batson specifically does not apply to the exercise of peremptory challenges by defendants. ***Batson,*** 476 US at 89, n.12; 106 S Ct at 1719 n.12; 90 L Ed 2d at 82 n. 12. *Batson* holds that the equal protection clause of the United States Constitution prohibits a prosecutor from purposefully exercising peremptory challenges to exclude potential jurors solely on account of race.

Holland specifically holds that prosecutors' exercise of peremptory challenges to exclude all black potential jurors from white defendants' petit jury does not violate defendants' Sixth Amendment right to trial by impartial jury. This decision should put to rest any claim that the use of peremptory challenges by a defendant is in any manner subject to scrutiny under the Sixth Amendment to the U. S. Constitution and likewise under Article I, Section I, Paragraph XI of the Georgia Constitution.

ASIDE FROM THE FOREGOING, THE QUESTION OF RACE HAS BEEN INJECTED IN THIS CASE BY THE BLACK COMMUNITY AND THUS HAS MADE IT ESSENTIAL FOR THE DEFENDANTS TO HAVE THE RIGHT TO UTILIZE PEREMPTORY STRIKES TO EXCLUDE BLACKS FROM THE TRIAL JURY.

Following the altercation out of which this case arose, there was circulated throughout the black community a communique or notice calling upon the black community to take action against the white parties who are now defendants in this case. A copy of such advertisement is attached hereto, and it can easily be seen from such attachment that race has been injected into this matter. It may be that some black persons of the community are not aware of such communique or notice. However, the defendants cannot inquire upon voir dire of the blacks on the venire if they are aware of such communique or advertisement, without calling to the attention of such blacks the contents of such communique or notice. Clearly under such circumstances, the defendants are entitled to peremptorily excuse members of the black race from the trial jury, not because they are black, but because they are black and the black community has attempted to prejudice blacks against the white defendants in this case.

Should a person of Iraqi descent charged with committing an assault on a Jewish person be able to excuse by peremptory challenge Jewish jurors on the belief that such jurors could conceivably be inclined to be more partial to a Jewish prosecutor. To ask the question is to answer it. Should a defendant charged with an assault

upon a person with long hair be permitted to peremptorily excuse males on the venire with long hair because of his belief that a male with long hair would be more apt to be partial toward a prosecutor with long hair? The provisions of ***Batson v. Ky., supra*** are absolutely unworkable if applied to a criminal defendant.

As was said in ***Swain, supra,***

> "While challenges for cause permit rejection of jurors on a narrowly specified provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable. ***Hayes v. Missouri,*** 120 US 68, 70 [30 L Ed 1011, 13 S Ct 136] [1892], upon a juror's 'habits and associations,' ***Hayes v. Missouri, supra,*** at 70 [30 L Ed 578, 7 S Ct 350], or upon the feeling that 'the bare questioning [a juror's] indifference may sometimes provoke a resentment,' ***Lewis, supra,*** at 376 [36 L Ed 1011, 13 S Ct 136]. It is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people [476 US 136] summoned for jury duty. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be. . . . Hence veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations, in the context of the case to be tried."

As was said in ***Swain*** what defense counsel in this case must decide is not whether a juror of the black race is in fact partial, but whether one from a different race is less likely to be partial. Group affiliations in the context of the case to be tried is a permissible reason for counsel to peremptorily challenge a member of a specified group.

CONCLUSION

Georgia law does not warrant a decision that a criminal defendant's use of peremptory challenges is subject to scrutiny. A criminal defendant may use his peremptory challenges for any reason, rightly or wrongly, seen fit. The decision of the lower court should be affirmed.

Respectfully submitted,

PERRY, WALTERS & LIPPITT

BY: /s/ Jesse W. Walters
JESSE W. WALTERS

/s/ Robert H. Revell
ROBERT H. REVELL, JR.
ATTORNEYS FOR APPELLEES

Post Office Box 469
Albany, Georgia 31703
(912) 432-7438

"KEEP THE DREAM ALIVE"

Dr. Martin Luther King taught that "non-violence" is the way to peace.

BE INFORMED . . . The McCollum Family, owners of McCollum's Dry Cleaners located at 1703 E. Broad Ave. in Albany attacked, kicked and beat a young black woman and her husband with a baseball bat, several days ago as they attempted to pick up clothing and dry cleaning.

This Community must respond to this violent act with "non-violence" & direct action. *We urge you to select another Dry Cleaners for your clothing.*

The McCollums have *no respect* for your black sister & brother, your daughter & son, your wife & husband. Spend your money with people who respect you.

Select another cleaners for your clothing!

1-15-90

Unity Community of Albany
Rep. John White, Chairman

EXHIBIT "A"

(Certificate of Service Omitted in Printing)

IN THE SUPERIOR COURT OF DOUGHERTY COUNTY
FOR THE STATE OF GEORGIA

STATE OF GEORGIA, Appellant, V. THOMAS SCOTT McCOLLUM, WILLIAM JOSEPH McCOLLUM, and ELLA HAMPTON McCOLLUM WHITE, Appellees.	: : : : : : : : : : :	CASE NUMBER: S91A0310

STIPULATION

(Filed Jan. 22, 1991)

The parties through their undersigned attorneys hereby agree and stipulate as to the following statement of facts:

For the purposes of the hearing on the State's Motion to prohibit Appellees from exercising their peremptory strikes in a racially discriminatory manner conducted in Dougherty Superior Court on October 22, 1990, before the Honorable Asa D. Kelley, Jr., the parties agreed that Judge Kelley should assume that a one-page statement entitled "Keep the Dream Alive" (*Attachment A* to this Stipulation) was widely distributed among the Black population of Albany, Georgia.

This, the 14th day of January, 1991.

/s/ Robert H. Revell, Jr.
ROBERT H. REVELL, JR.
Attorney for Appellees
Georgia Bar #601337
Post Office Box 70455
Albany, Geogia 31707

/s/ Jesse W. Walters
PERRY, WALTERS
& LIPPITT
JESSE W. WALTERS
Attorney for Appellees
Georgia Bar #0735800
Post Office Box 469
Albany, Georgia 31703

/s/ Harrison Kohler
HARRISON KOHLER
Deputy Attorney General
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334
Georgia Bar #427725

"KEEP THE DREAM ALIVE"

Dr. Martin Luther King taught that "non-violence" is the way to peace.

BE INFORMED . . . The McCollum Family, owners of McCollum's Dry Cleaners located at 1703 E. Broad Ave. in Albany attacked, kicked and beat a young black woman and her husband with a baseball bat, several days ago as they attempted to pick up clothing and dry cleaning.

This Community must respond to this violent act with "non-violence" & direct action. *We urge you to select another Dry Cleaners for your clothing.*

The McCollums have *no respect* for your black sister & brother, your daughter & son, your wife & husband. Spend your money with people who respect you.

Select another cleaners for your clothing!

1-15-90

Unity Community of Albany
Rep. John White, Chairman

IN THE SUPREME COURT OF GEORGIA

STATE OF GEORGIA

STATE OF GEORGIA, Appellant, v. THOMAS McCOLLUM, WILLIAM JOSEPH McCOLLUM, and ELLA HAMPTON McCOLLUM, Appellees.	*	CASE NO. S91A0310

SUPPLEMENTAL BRIEF ON BEHALF OF APPELLANT STATE OF GEORGIA BY THE ATTORNEY GENERAL

In *Powers v. Ohio*, 59 U.S.L.W. 4268 (April 1, 1991), the United States Supreme Court held that a white criminal defendant had standing to assert the interest of black jurors from being peremptorily struck from the jury for racially discriminatory reasons. "[R]acial discrimination in the disqualification or selection of jurors offends the dignity of persons and the integrity of the courts." *Id.*

That Court added:

> The purpose of the jury system is to impose upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair. The verdict will not be accepted or understood in these terms if the jury is chosen by unlawful means at the outset.
>
> *Id.*

It is the position of the State that not only does Georgia's Constitution prohibit a defendant from exercising his peremptory strikes in a racially discriminatory manner, but also the Equal Protection Clause of the Fourteenth Amendment protects jurors from being struck by a criminal defendant for racially discriminatory reasons.

This 9th day of April, 1991.

Respectfully submitted,

MICHAEL J. BOWERS 071650
Attorney General

/s/ Harrison Kohler
HARRISON KOHLER 427725
Senior Assistant Attorney General

PLEASE SERVE ALL
COMMUNICATIONS ON:

HARRISON KOHLER
Senior Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334
Telephone: (404) 651-6194

(Certificate of Service Omitted in Printing)

IN THE SUPREME COURT OF GEORGIA

STATE OF GEORGIA

STATE OF GEORGIA, Appellant, v. THOMAS McCOLLUM, WILLIAM JOSEPH McCOLLUM, and ELLA HAMPTON McCOLLUM, Appellees.	*	CASE NO. S91A0310

SECOND SUPPLEMENTAL BRIEF ON BEHALF OF APPELLANT STATE OF GEORGIA BY THE ATTORNEY GENERAL

In *Edmondson v. Leesville Concrete Co. Inc.*, ___U.S.___, 89-7743 (June 3, 1991), the United States Supreme Court held that private litigants in a civil case cannot be racially discriminatory in the exercise of peremptory strikes. In a civil trial the exclusion of jurors on account of race violates the prospective juror's equal protection rights. *Id.*

> By enforcing a discriminatory peremptory challenge, the court has not only made itself a party to the biased act but has elected to place its power, property, and prestige behind the alleged discrimination . . . and in a significant way has involved itself with invidious discrimination.

Id.

Clearly, the principles of *Batson* are not limited to the State, but are applicable to a criminal defendant. By exercising his peremptory strikes in a racially discriminatory

manner, a criminal defendant violates both the Georgia Constitution and the Equal Protection Clause of the Fourteenth Amendment.

This 4th day of June, 1991.

Respectfully submitted,

MICHAEL J. BOWERS 071650
Attorney General

/s/ Harrison Kohler
HARRISON KOHLER 427725
Senior Assistant Attorney General

PLEASE SERVE ALL COMMUNICATIONS ON:

HARRISON KOHLER
Senior Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334
Telephone: (404) 651-6194

(Certificate of Service Omitted in Printing)

In the Supreme Court of Georgia

Decided: JUL 12 1991

S91A0310. THE STATE V. McCOLLUM et al.

SMITH, Presiding Justice.

McCollum and others were indicted on several counts as a result of an altercation. The state filed a motion asking that the trial court prohibit the defendants from using peremptory strikes in a racially discriminatory matter. The motion was denied and the state appeals.

1. Since the order of the trial court, the United States Supreme Court has decided the case of *Edmonson v. Leesville Concrete Co., Inc.*, 59 USLW 4574, decided June 3, 1991. In that case, the Court held, generally, that the exclusion of any prospective juror by virtue of race would constitute an impermissible injury to that juror. 59 USLW 1578.

2. *Edmonson*, of course, was a civil action. While it may be that the United States Supreme Court may, in another case, prohibit a criminal defendant from exercising peremptory challenges to exclude jurors on the basis of race, it has not yet done so. Bearing in mind the long history of jury trials as an essential element of the protection of human rights, this court declines to diminish the free exercise of peremptory strikes by a criminal defendant.

Judgment affirmed. All the Justices concur, except Hunt, Benham, and Fletcher, JJ., who dissent.

S91A0310. THE STATE v. McCOLLUM et al.

HUNT, Justice, dissenting.

I respectfully dissent because the inescapable conclusion from *Edmondson v. Leesville Concrete Co.*, 59 USLW 4574, decided June 3, 1991, is that no one, not even a criminal defendant, may exercise peremptory strikes so as to exclude jurors in a racially discriminatory manner. *Edmondson* makes is abundantly clear that the exercise of peremptory strikes by any party in any case, pursuant to a state or federal statute, in a state or federal courtroom, is "state" action. And, under *Edmondson*, when that action excludes jurors on the basis of race it may be challenged by the court, by the opposing party, or even by the juror and remedied.

Edmondson, however, is but the latest pronouncement of the federal courts leading to this result. Surely this result was forecast by *Batson v. Kentucky*, itself.[1] While the *Batson* majority sidestepped the issue: "We express no views on whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel," id., 106 S.Ct. at 119, n.12, the dissenting opinion of Chief Justice Burger reasoned:

> [T]he clear and inescapable import of this novel holding will inevitably be to limit the use of this valuable tool to both prosecutors and defense attorneys alike. Once the court has held that

---

[1] 476 U.S. 79 (106 SC 1712, 90 LE2d 69) (1986).

> *prosecutors* are limited in their use of peremptory challenges, could we rationally hold that defendants are not?

(Emphasis in original). 106 S.Ct. at 1738. (Burger, C.J., dissenting). Moreover, as the 5th Circuit Court of Appeals confirmed in *U.S. v. Leslie*, 783 F.2d 541, 565 (5th Cir. 1986):

> [E]very jurisdiction which has spoken to the matter, and prohibited prosecution case-specific peremptory challenges on the basis of cognizable group affiliation, has held that the defense must likewise be so prohibited.[2]

The rule of *Batson* has proceeded from enforcing the equal protection rights of black defendants to those of white defendants and to those of jurors whose rights may be enforced by the state as well as the defendant. It has expanded from criminal cases to civil cases and from race to gender. One may legitimately question whether peremptory challenges will survive the enveloping application of the rule. Consider the observation of Judge Charles E. Moylan, Jr., writing for the Court of Special Appeals of Maryland in *Chew v. State*, 527 A2d 332 (Md. App. 1987):

> To hold that, in the jury selection process, the equal protection clause is available only to black

---

[2] Cognizable group affiliation may not be limited to those of the same race. In *U.S. v. De Gross*, 913 F2d 1417 (9th Cir. 1990), the 9th Circuit Court of Appeals prohibited the *defendant's* peremptory strikes which were based on gender, holding (a) peremptory challenges based on gender violate the jurors' equal protection rights and those rights may be asserted by the government and (b) a criminal defendant's peremptory challenge is state action.

> defendants deprived of black jurors is philosophically indefensible. Once the protection is moved beyond the narrow base, however, there is not logically defensible way to contain it. Between the absolute abolition of the peremptory challenge, on the one hand, and the absolute refusal to look behind the unfettered use of the peremptory challenge, on the other hand, there may be no tenable middle ground.

Id. at 350.

The majority acknowledges the inevitable but prefers to await further instructions from Washington. In the meantime it reveres the defendants' entitlement to racially-motivated peremptory strikes as though it were of constitutional significance. But peremptory strikes, unlike the prohibition against racial discrimination, enjoy no constitutional foundation. Fundamental to *Edmondson* is the notion that racially-motivated strikes are just another form of racial discrimination which deserves no protection in the administration of justice in our courts. If this is true, it defies all logic to say that such strikes are prohibited only when exercised by the state.[3] I would reverse the denial of the state's motion.

---

[3] This is the position of Justice Scalia's dissent as to the impact of the *Edmondson* majority opinion which he believes is more harmful than helpful to the minority defendant.

> In criminal cases, *Batson v. Kentucky*, [cit.] already prevents the *prosecutor* from using race-based strikes. The effect of today's decision (which logically must

(Continued on following page)

S91A0310. THE STATE V. McCOLLUM et al.

BENHAM, Justice, dissenting.

I must respectfully dissent and must write separately to point out how the majority opinion, by refusing to hold that race is an impermissible consideration in determining a person's fitness for jury service, does unmistakably serious harm to the integrity of the jury selection process.

1. The majority opinion fails to take into consideration an almost unbroken chain of United States Supreme Court opinions leading to the abolition of race as a consideration for jury service: *Strauder v. West Virginia*, 100 U.S. 303 (25 LE 664) (1879); *Swain v. Alabama*, 380 U.S. 202 (85 SC 824, 13 LE2d 759) (1965); *Taylor v. Louisiana*, 419 U.S. 522 (95 SC 692, 42 LE2d 690) (1975); *Batson v. Kentucky*, 476 U.S. 79 (106 SC 1712, 90 LE2d 69) (1986); *Powers v. Ohio*, 499 U.S. ___ (111 SC 1364, 113 LE2d 411) (1991); *Edmonson v. Leesville Concrete Co., Inc.*, 59 USLW 4574, decided June 3, 1991. It is evident from these opinions that in the area of jury service, the trend has been one of inclusiveness rather than exclusiveness.

(Continued from previous page)

> apply to criminal prosecutions) will be to prevent the *defendant* from doing so – so that the minority defendant can no longer seek to prevent an all-white jury, or to seat as many jurors of his own race as possible. To be sure, it is ordinarily more difficult to *prove* race-based strikes of white jurors, but defense counsel can generally be relied upon to do what we say the Constitution requires. So in criminal cases, today's decision represents a net loss to the minority litigant. (Emphasis in original).

Edmondson, supra, at p. 4582 (Justice Scalia, dissenting).

In condemning racial discrimination in the jury selection process, the United States Supreme Court has highlighted not only the harm to the parties, but also the harm done to the jury selection process itself by the exclusion of prospective jurors on the basis of race. Justice Kennedy, writing for the majority in *Powers*, supra, 111 SC at 1368, said that *Batson* "was designed to serve multiple ends." One of those ends must be to allow ordinary citizens to participate in the administration of justice, which Justice Kennedy described as "one of the principal justifications for retaining the jury system." Id. He went on to state the holding in that case:

> the Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race, a practice that forecloses a significant opportunity to participate in civil life. [Id. at 1370]

The most recent case applying the principles which are apparent in this trend toward inclusiveness is *Edmonson v. Leesville Concrete Co.*, supra, which prohibited race-conscious jury strikes in civil cases. The focus of the court's reasoning in *Edmonson* is on the harm done to jurors and to the justice system, and the court found that the harm was no less because the discrimination occurred in a civil case. Applying the same reasoning, it is obvious that the harm which racial discrimination in selecting a jury does to the integrity of the jury selection process is

just as egregious whether it is done by the state or the defendant in a criminal trial or by the plaintiff or defendant in a civil trial.

2. While I would join Justice Fletcher's dissent to the extent it says *Edmonson* requires racial neutrality in jury selection under the United States Constitution, I would go one step further and also address the issue of the applicability of our state constitution to racially motivated peremptory strikes.

An important question which was raised in the enumerations of error, and briefed and argued by the parties, but not addressed by the majority opinion, and which needs to be addressed here, is whether Art. I, Sec. I, Par. XI, of the Georgia Constitution, which guarantees every accused a trial by an impartial jury, also protects all citizens from racial discrimination in jury service even to the extent of curtailing a defendant's use of racially-motivated peremptory strikes.

The majority's view fails to take into consideration the dynamic aspect of constitutional jurisprudence. Justice John Marshall put the matter of dynamic versus static jurisprudence in proper perspective in *McCulloch v. Maryland*, 17 U.S. 316, 407-415 (4 LE 579) (1819):

> We must never forget that it is *a constitution* we are expounding . . . a constitution intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs.

Such a crisis was recognized in *Batson v. Kentucky*, supra, when the United States Supreme Court, considering the use of peremptory strikes by the state, employed the Equal Protection Clause of the U.S. Constitution to forbid

the use of racially-motivated strikes by the state, and put in place a legal mechanism for preventing future abuse.

Recognizing the literal correctness of the majority's statement that the U.S. Supreme Court has not yet held that defendants in criminal cases are limited to race-neutral exercises of peremptory challenges, I believe it is incumbent on the highest appellate court in this state, in the exercise of our duty to defend and protect the integrity of the judicial process and, as a necessary part of it, the jury selection process, to look to our state constitution for the appropriate means of achieving that laudable goal. While state courts cannot afford less protection under the state constitution than is required under the United States Constitution, there is no prohibition against the states providing their citizens more protection under the state constitution than is provided under the federal constitution. *Creamer v. State*, 229 Ga. 511 (3) (192 SE2d 350) (1972). The authority to grant that protection in this case is found in Art. I, Sec. I, Par. XI, of our state constitution:

> The right to trial by jury shall remain inviolate . . . In criminal cases, the defendant shall have a public and speedy trial by an impartial jury; . . .

The language of that constitutional provision does not lodge exclusively with the defendant the right to trial by jury. Since the right to a jury trial includes the right to a jury drawn from a fair cross-section of the community (*Taylor v. Louisiana*, 419 U.S. 522 (95 SC 692, 42 LE2d 690) (1975)), then the right to fair and impartial jury selection belongs to the community as well as the defendant.

> The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. [*Batson*, supra at 107]
>
> The injury [from discriminatory jury selection] is not limited to the defendant – there is injury to the jury system, to the law as an institution, to the community at large, and the democratic ideal reflected in the process of our courts. [*Ballard v. United States*, 329 U.S. 187, 195 (67 SC 261, 91 LE2d 181) (1946)]

Having both the duty and the authority to do so, we must declare it to be offensive to the Constitution of the State of Georgia for any party in a criminal proceeding to use race as a factor in determining a person's fitness for jury service.

3. Whether considered under the Georgia Constitution or under the U.S. Constitution as applied in *Edmonson*, the majority's conclusion that the right of a defendant in a criminal action to use peremptory strikes outweighs the right of prospective jurors to be considered for participation in the judicial system without consideration of race, is untenable. The unfettered exercise of peremptory challenges by either the defendant or the State to strike members of cognizable groups destroys the right to a jury drawn from a representative cross-section of the community. Peremptory challenges are not constitutionally protected fundamental rights – they are but one statutory tool in the effort to reach the constitutional goal of a fair and impartial jury.[4] While OCGA

---

[4] "[T]here is no constitutional obligation to allow [peremptory challenges]." *Edmonson*, supra, 59 USLW at 4576.

§ 15-12-165 itself places no restrictions on the right to peremptory challenges, this court has recognized that the right is not without limits: in *Gamble v. State*, 257 Ga. 325 (357 SE2d 792) (1987), this court adopted the reasoning of *Batson* and imposed a restriction of racial neutrality on the state in criminal cases. Although we have in the past given criminal defendants great deference in their use of peremptory strikes, that deferential treatment must be abandoned when it begins to erode the public's confidence in the entire legal process. Racially motivated jury strikes are of such an egregious nature that the jury selection process will suffer irreparable damage if we fail to act.

The public interests in need of protection in this case are the integrity of the jury selection process, the very foundation of the truth-finding process, and the compelling need to encourage citizens to fulfill their citizenship requirements by freely serving on juries without the fear of having racial prejudice visited upon them.

> If the courts allow jurors to be excluded because of group bias, be it at the hands of the State or the defense, they would be willing participants in a scheme that could only undermine the very foundation of our system of justice – our citizens' confidence in it. [*State v. Alvarado*, 221 N.J. Super. 324 (534 A2d 440) (1987)]

Being convinced that the trial court erred in denying the State's motion, I would reverse. Consequently, I must dissent to the judgment of affirmance.

S91A0310. THE STATE V. MCCOLLUM et al.

FLETCHER, Justice, dissenting.

As the majority notes, while the present case was pending in this court, the United States Supreme Court decided *Edmonson v. Leesville Co., Inc.*, 59 USLW 4574, decided June 3, 1991, reversing and remanding 895 F2d 218 (5th Cir. 1990). *Edmonson* holds that

> a private litigant in a civil case may [not] use peremptory challenges to exclude jurors on account of their race. . . . [because] the race-based exclusion violates the equal protection rights of the challenged jurors.

Edmonson, 59 USLW at 4575.

As I interpret *Edmonson*, the United States Supreme Court has determined that the process of jury selection constitutes state action in that the objective of the selection process is determination of representation on a governmental body and "[t]he fact that the government delegates some portion of this power to private litigants does not change the governmental character of the power exercised." *Edmonson*, 59 USLW at 4577. Accordingly, the restrictions placed upon the exercise of racially based peremptory jury strikes by the equal protection component of the Fifth Amendment's Due Process Clause would appear to apply to all parties in both civil and criminal cases.[5]

---

[5] In his dissenting opinion, Justice Scalia points out that the majority decision in *Edmonson* "logically must apply to criminal prosecutions." *Edmonson*, 59 USLW at 4582.

Based upon the aforesaid interpretation of the holding in *Edmonson*, I feel compelled to apply that holding to the present case.[6] In so doing, I would find that the trial court erred in denying that state's motion to have appellees prohibited from using their peremptory strikes in a racially discriminatory manner and would reverse and remand the case to the trial court.

---

[6] As it seemed apparent that there is no state action involved in an accused's exercise of his or her peremptory strikes, my initial observation concerning this case was more in line with the majority opinion and with Justice O'Connor's dissenting opinion in *Edmonson*, 59 USLW at 4579-4582. However, it now appears that a determination has been made that the rights of a defendant, whether a private litigant or an accused in a criminal trial, are subservient to the rights of prospective jurors who are not on trial and whose life, liberty, and property are not at stake.

IN THE SUPREME COURT OF GEORGIA

STATE OF GEORGIA

STATE OF GEORGIA,	*	
Appellant,	*	
v.	*	CASE NO.
THOMAS McCOLLUM,	*	S91A0310
WILLIAM JOSEPH McCOLLUM,	*	
and ELLA HAMPTON McCOLLUM,	*	
Appellees.	*	

STATE'S MOTION FOR REHEARING

The State respectfully asserts that the majority opinion conflicts with the holding of *Edmondson v. Leesville Concrete Co., Inc.*, ___ U.S. ___, 59 L.W. 4574 (1991), that the racially discriminatory exclusion of jurors by peremptory strikes violates the jurors; Fourteenth Amendment right to equal protection under the law.

Moreover, this Court has recently held that our State Constitution offers broader protection than does the United States Constitution. *Denton v. Con-Way Southern Express*, 261 Ga. 41, 45 (1991); *see, e.g., Harris v. Entertainment Systems, Inc.*, 259 Ga. 701 (1989). If this Court does not wish to reach the federal constitutional issue, the discriminatory exercise of peremptory strikes is still prohibited by the Georgia Constitution. *State v. McCollum*, ___ Ga. ___ (1991) (J. Benham dissenting).

Surely the time has passed when citizens of this state must seek the protection of the federal courts against racially discriminatory practices. With this case, this Court has the opportunity to forcefully demonstrate that

Georgia Courts, applying the Georgia Constitution, will likewise preserve and protect the integrity of the jury selection process.

This 19th date of July, 1991.

Respectfully submitted,

MICHAEL J. BOWERS 071650
Attorney General

/s/ Harrison Kohler
HARRISON KOHLER 427725
Senior Assistant Attorney General

PLEASE SERVE ALL
COMMUNICATIONS ON:

HARRISON KOHLER
Senior Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334
Telephone: (404) 651-6194

(Certificate Of Service Omitted In Printing)

SUPREME COURT OF GEORGIA

ATLANTA JULY 24, 1991

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Case No. S91A0310

THE STATE V. THOMAS SCOTT MCCOLLUM, ET AL.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Hunt, Benham and Fletcher, JJ., who dissent.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

Joline B. Williams, Clerk.